CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3730

Heard in Calgary, Tuesday, 10 March 2009

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Claim for wages associated with cancelled call to fill 08:30 yard vacancy.

JOINT STATEMENT OF ISSUE:

On March 16, 2008 Locomotive Engineer Ficek was called from the locomotive engineers' spareboard to deadhead from Kenora to Dryden to work a Dryden yard assignment at 08:30 March 17, 2008 for one shift.

After reporting for work, Mr. Ficek was involved in a job briefing with the other two yard employees when the regularly assigned locomotive engineer reported for work. As a result, Mr. Ficek was cancelled and deadheaded back to Kenora.

The Union contends that from the time the Company first called Locomotive Engineer Ficek to deadhead to Dryden to work the assigned yard he comes under the rules for a regularly assigned locomotive engineer on that yard assignment. Locomotive Engineer Ficek was on duty in yard service when cancelled [and] as such should be compensated the same as the regular locomotive engineer. The Union contends that Locomotive Engineer Ficek is entitled to rights and benefits entitled by the collective agreement articles 4.03(2), 4.10 or 4.12(7).

The Company denies this request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. ABLE	**(SGD.) A. AZIM GARCIA**
GENERAL CHAIRMAN	**FOR: ASSISTANT VICE-PRESIDENT, OPERATIONS**

There appeared on behalf of the Company:

A. Azim Garcia	– Manager, Labour Relations, Calgary
J. Dorais	– Labour Relations Officer, Calgary
R. Hampel	– Counsel, Calgary
J. Bairaktaris	– Director, Labour Relations, Calgary

And on behalf of the Union:

G. Edwards	– Sr. Vice-General Chairman, Revelstoke
D. Ellickson	– Counsel, Toronto
D. Able	– General Chairman, Calgary

T. Canfield – Local Chairman, Kenora
A. Lockhart – GST – GCA, Kenora

AWARD OF THE ARBITRATOR

While a number of provisions of the collective agreement were advanced in support of the positions of both parties, at issue in this case is the application of article 4.12(7) of the collective agreement. It reads as follows:

> 4.12 Guarantee
>
> (7) Regularly assigned Engineer who may be cancelled after reporting for duty at the regular starting time of the assignment will be paid a minimum day at minimum yard rate for same, but will be liable for further yard service to the extent of 8 consecutive hours. Except in unavoidable circumstances, regularly assigned Engineer who is to be cancelled before reporting for duty will receive at least 8 hours' advance notice. When assignment is to be cancelled for a General Holiday or for a reduction in the number of assignments the regularly assigned Engineer will receive at least 16 hours' advance notice.

It is not disputed that the grievor occupied a position on the locomotive engineers' spareboard at Kenora. As a spare engineer he was called to work a regular yard assignment at Dryden, in relief of the engineer who held that regular yard assignment. Apparently by reason of a mistake made by the Company, after the grievor reported to work at 08:20 on March 17, 2008 and had commenced the required job briefing at 08:30, the regular engineer arrived and reported for duty. The Company then cancelled Locomotive Engineer Ficek at 08:45, before he undertook the operation of his locomotive, ordering him in straightaway deadhead service back to Kenora. In addition to the deadheading mileage which was paid to him, the Company paid the grievor a called and cancelled claim for the yard shift, pursuant to the provisions of article 10 of the collective agreement. The Union maintains that the grievor was entitled to the payment contemplated under article 4.12(7), reproduced above.

The Arbitrator has considerable difficulty with the argument advanced by the Union. Firstly, it asserts that claims such as the one it makes in the instant case under the provisions of article 4.12(7) have been paid without dispute as a matter of past practice by the Company, and that the refusal of the claim of the grievor in the instant case constitutes a reversal of position in violation of the collective agreement. The difficulty with that argument is that it is far from clear that there was ever any common knowledge of the parties with respect to the details of the wage tickets submitted by the employees who, admittedly on very rare occasions, encountered the circumstances experienced by Locomotive Engineer Ficek on March 17, 2008. The random auditing of time claims may simply not have detected such tickets, resulting in the payment of claims made without any appreciable understanding on the part of the Company as to what had transpired. In these circumstances the Arbitrator is not persuaded that events of the past of that kind can be viewed as constituting a compelling past practice within the knowledge of both parties such as to sustain the interpretation advanced by the Union.

More significantly, it appears to the Arbitrator that the Union's claim essentially disregards the critical premise of article 4.12(7) of the collective agreement, which is that it applies to the cancelled assignment of a "Regularly assigned Engineer". That article appears within the broader context of article 4 which deals with Yard Service and under the general heading of the guarantee which is paid to regularly assigned locomotive engineers in yard service. The collective agreement makes numerous separate references to regularly assigned locomotive engineers on the one hand, and

spare locomotive engineers on the other. By the employer's count there are eighteen references to spare locomotive engineers and some twenty references to regularly assigned locomotive engineers within the text of the collective agreement. Locomotive engineers can work by holding regular assignments, by taking assignments from pools or from receiving assignments from a spareboard. Article 25.05 of the collective agreement contemplates, among other things, that pools and spareboards are to be regulated by local Company and Union officers. Employees on spareboards can be called to road or yard service. By contrast, employees who hold regular assignments in yard service have little or no uncertainty as to the time of their working hours, generally being required to work an assignment which has regular daily hours.

Decisions of this Office have had occasion to emphasize the importance of the distinction between employees who work from a spareboard and those who hold regular assignments (see, e.g., **CROA 2932** and **3324**). The distinction can be important to the extent that different terms and conditions of work and compensation may apply to one or the other class of service. Those differences must be taken to be the product of relatively complex bargaining and trade offs made between the parties over the many years of their bargaining relationship. It is therefore incumbent upon a board of arbitration to give force and effect to the choice of words made by the parties in fashioning various pay provisions of their collective agreement.

When the foregoing principles are applied to the case at hand, the inescapable conclusion is that article 4.12(7) of the collective agreement was mutually intended to

apply only to a “Regularly assigned Engineer”. That was not the status of the grievor on March 17, 2008 when he was at Dryden. He was then in Dryden as a spareboard employee assigned in relief of a regularly assigned locomotive engineer. The fact that he may have been about to assume the assignment of that locomotive engineer does not convert him into a regularly assigned locomotive engineer for the purposes of the yard service provisions of article 4, including article 4.12(7) of the collective agreement.

Similarly, there is nothing of the face of article 10, the called and cancelled provision which was applied by the Company, to suggest that it cannot apply to a locomotive engineer called for duty off a spareboard and then cancelled either before or after reporting for duty. While article 10.02 of the collective agreement does speak expressly to the circumstance of locomotive engineers in assigned road service, article 10.01 appears, on its face, to have a broader application. It is, in any event, unnecessary to make an ultimate determination as to the application of article 10, as the claim before me turns of the interpretation and application of article 4.12(7) of the collective agreement. I therefore make no ultimate determination as to the application of article 10 save to say that it would, at first impression, appear to have application to the facts at hand.

In the result, the Arbitrator cannot conclude that the grievor, a spareboard locomotive engineer assigned in relief of a regularly assigned locomotive engineer at Dryden was entitled, in the circumstances which presented themselves on March 17,

2008, to make a claim under the provisions of article 4.12(7) of the collective agreement. For these reasons the grievance must dismissed.

March 16, 2009

(signed) MICHEL G. PICHER
ARBITRATOR